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Chapter 7: Domestic Relations and Persons

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CHAPTER 7

Domestic Relations and Persons

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§7.1. Minors: Use of father's surname. In *Margolis v. Margolis*[1] an injunction was sought by a father against his divorced wife to restrain her from registering their children in schools under the mother's maiden name. The lower court found that the use of the mother's name was not in the best interests of the children and granted an injunction. On appeal this was upheld and further relief was granted, affirmatively ordering that the children be registered as Margolis.

The *Margolis* case should be considered with *Mark v. Kahn*.[2] Both of these cases indicate that the primary consideration in such cases is the best interests of the minor child; this is surely true, and the result in both cases seems desirable. Both cases leave unclear, however, just what are the father's rights, if any. In each case the father sued in his own right, rather than on behalf of the minor; and in the *Mark* case the Court specifically indicated that the father had the right to bring an action in equity on his own behalf to obtain the relief sought. It would seem that a personal right has been at least implicitly recognized as existing in the father, although the extent, or at least the enforceability of that right, is almost completely coextensive with the best interests of the child.

§7.2. Enforcement of support: Uniform act. In *Kirby v. Kirby*,[1] brought under the Uniform Enforcement of Support Act,[2] now under the jurisdiction of the District Courts, the initiating state was New York and the responding state Massachusetts. Some points raised by the case were fully resolved and the other issues were at least partially resolved.

First, the Supreme Judicial Court held that the forwarding by the initiating state to the wrong District Court,[3] followed by the forwarding by that court to the proper District Court in whose jurisdiction the

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§7.1. 1 338 Mass. 416, 155 N.E.2d 177 (1959).
2 333 Mass. 517, 131 N.E.2d 758, 53 A.L.R.2d 908 (1956), discussed in 1956 Ann. Surv. Mass. Law §§5.2, 9.7.

§7.2. 1 338 Mass. 263, 155 N.E.2d 165 (1959).
2 G.L., c. 273A.
3 The Lawrence District Court.

respondent lived, followed in turn by process issued from the latter court and served in hand upon the respondent, was a compliance with Chapter 273A. This is in consonance with the policy specifically declared in that chapter.[4] The Supreme Judicial Court went on to hold that the forwarding from the wrong to the right court was a compliance with Section 8 of the chapter. Typographical errors and misspellings, as arguments against the validity of the petition, were held to be frivolous.

Second, it appeared that the respondent had appeared specially by attorney and moved to quash the process and to dismiss. Both motions were denied and an order of support was made. The Court held that the making of an order against a defendant who had never appeared generally nor answered to the merits, and before he was ever defaulted, was error.

Third, considering questions not necessary to the decision but treated because they might arise on retrial, the Court indicated that the proceedings forwarded by the initiating state were insufficient upon which to base an order because the petition failed to disclose the residence of the children. The statement of residence of the petitioner was held to be insufficient without a further allegation of the residence of the children, under both the New York and Massachusetts versions of the uniform act.

The Court rejected a contention regarding the verification of the petition, holding that the oath before the clerk of the New York Children's Court — similar to many oaths authorized to be administered before clerks of Massachusetts courts — was in conformance with the provisions of Chapter 273A.

Perhaps most significant of all, the latter part of the opinion defined the force and extent of the petition and the certificate of the initiating state. The procedure in the initiating state is ex parte: the findings are not evidence,[5] and are not analogous to findings in jury-waived proceedings. The case cannot be heard without evidence, and the transcript of testimony is not a deposition. In the absence of an appearance by the respondent and admissions by him sufficient to prove the case, the case must fail unless proved by deposition or direct testimony of the petitioner. The whole purpose of the law, of course, is to prevent the necessity of the latter.

Finally, the Court reiterated the proposition that now, by statute,[6] the legal duty to support a child continues even though a father is deprived of legal custody.

[4] See G.L., c. 273A, §17, stating that the chapter "shall be so construed and interpreted as to accomplish its general purpose. . . ." "The purpose of the Uniform Enforcement of Support Act is to obtain support for dependents, and not to provide a procedural field day for defaulting husbands and fathers." Wilkins, C.J., in Kirby v. Kirby, 338 Mass. 263, 268, 155 N.E.2d 165, 168-169 (1959).

[5] The Court cited Phillips v. Phillips, 336 Mass. 561, 146 N.E.2d 919 (1958).

[6] G.L., c. 273, §8.

§7.3. Support of kindred. In *Town of Hatfield v. Klimoski,*[1] the defendant claimed the right to appeal to the Superior Court under the provisions of G.L., c. 231, §97. This was a proceeding in the District Court to enforce the liability of kindred to support a parent under G.L., c. 117. The Supreme Judicial Court held that this proceeding, with all its changes through recent years from Superior Court to Probate Court and now to District Court,[2] remains essentially an equity proceeding, and as such it is not subject to appeal to the Superior Court under Section 97.

§7.4. Adoption. The case of *Adoption of a Minor*[1] was one of first impression regarding the requirement of consent of the natural father of an illegitimate child who, after the mother's consent had been given to the adoption, married her, thereby legitimizing the child.[2] In this case the child was placed with the petitioners through the mother's doctor with the active cooperation of the natural father. The Department of Public Welfare filed a report disapproving the proposed adoption.[3] Both natural parents now oppose the adoption, and had in the meantime married each other.

The withdrawal of the mother's consent was, of course, within the discretion of the court.[4] The main question was whether the father's consent, never having been formally given and the child now being legitimate, was necessary. If necessary at all, it would be absolutely necessary rather than a discretionary matter.[5]

The Supreme Judicial Court examined the authorities and cited many conflicting cases in its opinion. The Court finally concluded that the consent of a father who was not a lawful parent at the time of the child's birth, nor at the time there is a default under the adoption procedure,[6] is not required by Section 2 of G.L., c. 210. Unfortunately, the Court beclouds this conclusion by mentioning a possible estoppel by the father's participation in the placement, although it goes on to say this "probably does not impose an absolute estoppel" upon him "for the probate judge could certainly permit him to oppose [the adoption]." In view of the ultimate conclusion that his consent is not required, it would seem that this latter had better been left unsaid, for if Section 2 requires his consent the Probate Court could have no discretion in the matter. The case adds up, it seems, to a flat ruling that the father's consent is not required in such a situation.

There are other points in the present case, probably of lesser im-

§7.3. [1] 338 Mass. 81, 153 N.E.2d 648 (1958).
[2] Acts of 1950, c. 485, as amended by Acts of 1956, c. 156.

§7.4. [1] 338 Mass. 635, 156 N.E.2d 801 (1959).
[2] G.L., c. 190, §7.
[3] Id., c. 210, §5A.
[4] This is settled by Erickson v. Raspperry, 320 Mass. 333, 69 N.E.2d 479 (1946). See Wyness v. Crowley, 292 Mass. 461, 198 N.E.2d 758 (1935).
[5] G.L., c. 210, §2.
[6] Id. §§4, 5.

portance but nevertheless worthy of comment. First, the Court noted that the Department had not approved the adoption, but held that the Probate Court properly treated the hearing on the merits as an appeal from the disapproval under G.L., c. 210, §2A(E), no formal document of appeal being necessary.

More important, the Supreme Judicial Court commented upon the circumstances of the child's placement. The facts were that the unmarried prospective mother asked the doctor to refer the baby to some private family. The doctor found that the petitioners were childless and were going to Sicily to find a child to adopt; he informed them, while already in Europe, that this child was available, and they returned immediately; the mother and natural father soon thereafter left the child at the doctor's office. This was recited as the evidence, although the probate judge found that the child was left with the male petitioner's brother. The Court said that it was immaterial whether the parents left the child with the petitioner's brother or with the doctor, "for the judge would have been amply justified in finding that the doctor was the mother's agent." There was a finding that the "adoption paper" was signed in a manner so that the petitioners would not know the names of the adopting parents. It is difficult to conceive of a case wherein a doctor had greater power over the adoption than that here authorized by the mother; the only possible exercise of greater power by a doctor might occur if he placed a child entirely on his own without previous consultation with the mother. Hence, the question arises, when is any placement by a doctor illegal? General Laws, c. 119, §6, cited in a footnote to the opinion,[7] seems obviously intended to impose strict regulations upon just such placements as this.

§7.5. Foreign decrees: Enforcement. In *Adams v. Adams*,[1] a suit was brought in the Superior Court upon a New York judgment for an arrearage under a New York separate support decree. After the decree in New York, and before the New York judgment now sued upon, the husband obtained a decree of divorce in Illinois. The wife argued that the Illinois divorce was not valid because she never appeared in that proceeding and never was personally served with process. The trial judge found that the action could not be maintained because the plaintiff wife had taken the position that she was still the wife, and therefore could not sue her husband in the Superior Court under the provisions of G.L., c. 209, §6. The Supreme Judicial Court upheld the ruling that if she were still the wife she could not sue in the Superior Court but overruled the trial judge's ruling that she had taken an irrevocable position that she was still the wife. The judge had found it unnecessary to rule upon the validity of the Illinois divorce. This was held error. The Court noted that the rule of New York regarding "divisible divorce" applied, namely that the severance

7 338 Mass. 635, 638, 156 N.E.2d 801, 803-804 (1959).

§7.5. 1 338 Mass. 776, 157 N.E.2d 405 (1959).

of the marital bond by a foreign divorce does not necessarily cut off the effect of a New York decree for separate support.[2]

The Court reasoned that if, under the rule of the *Estin* case,[3] the duty of support under the New York decree might still remain, although the parties might be divorced and therefore no longer husband and wife, this action might be maintained in the Superior Court. The case was therefore remanded for determination of the validity of the Illinois divorce.

§7.6. Marriage: Validity. The latest in the line of cases ruling on validation of a bigamous marriage by living together in good faith after removal of the impediment[1] is *Stamper v. Stanwood.*[2] This case involved the right of one alleged cousin to have notice of and to be heard on the petition for appointment of an administrator of an estate. The question was whether the grandparents of the party were legally married. The marriage, in 1854, was admittedly bigamous because the male party had been married in 1850 and there was no evidence as to the whereabouts of the first wife. However, the second wife lived with him for over forty-five years and they had ten children, including the mother of the party now litigant. There seemed to be no evidence that the second wife knew of the previous marriage at the time of her marriage in 1854, but there was evidence that she did know of the previous marriage at least in 1880. The Supreme Judicial Court held that the wife was entitled to rely upon the seven-year presumption of death of the former wife, and that "every presumption is in favor of her good faith." [3] The validity of the marriage was upheld and the descendant held entitled to notice and to be heard in the administration proceedings.

2 Estin v. Estin, 296 N.Y. 308, 73 N.E.2d 113 (1947), *aff'd,* 334 U.S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948).
3 See note 2 *supra.*

§7.6. 1 G.L., c. 207, §6.
2 1959 Mass. Adv. Sh. 1169, 159 N.E.2d 865.
3 1959 Mass. Adv. Sh. at 1172, 159 N.E.2d at 868. Compare Fraser v. Fraser, 336 Mass. 597, 147 N.E.2d 165 (1958).